COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS & ENERGY

In the Matter of the Implementation of the Federal Communications Department's Triennial UNE Review Decision.

D.T.E. 03-60

CONVERSENT COMMUNICATIONS OF MASSACHUSETTS, LLC'S COMMENTS ON SCOPE AND GUIDELINES FOR APPLYING THE FCC'S IMPAIRMENT TRIGGERS TO LOOPS AND TRANSPORT

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Conversent Communications of Massachusetts, LLC ("Conversent") by its attorneys, hereby files these Comments on Scope and Guidelines for Applying the FCC's Impairment Triggers to Loops and Transport for the purpose of providing the Department of Telecommunications & Energy (the "Department") guidance as to the manner in which it should conduct fact-finding proceedings regarding unbundled loops and dedicated transport pursuant to the authority delegated to the states by the FCC in the *Triennial Review Order*.[1]

Conversent is a competitive local exchange carrier ("CLEC") that is duly certified to provide local exchange and long distance service in the state of Massachusetts. Conversent provides local voice and data services to small and medium-sized businesses in Massachusetts in second and third-tier markets by relying on voice grade, xDSL, high-capacity DS1, and high capacity DS3 loops, unbundled dark fiber dedicated transport that Conversent lights using its own optronics collocated in incumbent LEC central offices, and Conversent's own switches. By relying on this combination of facilities, Conversent has been able to make available voice and

[1] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

data service offerings to small and medium-sized businesses in smaller cities in Massachusetts where otherwise there would likely be no such competitive alternatives.

In the *Triennial Review Order*, the FCC delegated to the states important responsibilities for applying the FCC's impairment standard to loops, dedicated transport and switching. For purposes of this proceeding, it is important to emphasize that the states' responsibilities regarding loops and transport are similar to each other but substantially different from those delegated for switching. For example, as described below, the FCC conclusively determined that, with regard to both loops and transport, the relevant geographic area for purposes of state impairment proceedings is the particular point-to-point route served by the loop (*i.e.*, the customer served) or dedicated transport circuit (*i.e.*, the interoffice route served by the transport facility). As also described below, the FCC conclusively established the subcategories of loops and transport (in both cases dark fiber, DS3 and DS1) to be reviewed in state proceedings. In contrast, in the case of switching, the FCC left to the states the tasks of defining the relevant geographic areas (stating only that the relevant areas cannot be an entire state) and the relevant subcategories (*i.e.*, how to differentiate between switches used to serve mass market and enterprise customers) for purposes of state proceedings. *See Triennial Review Order* ¶¶ 495, 497. Furthermore, the FCC directed the states to adopt specific measures (or to explain why none are required) in the form of improved hot cut processes to lower an operational barrier to entry for competitors relying on non-incumbent LEC switches (*see id.* ¶ 488), a requirement for

which there is no corollary for loops and transport under the *Triennial Review Order*.[2] The FCC also required the states to consider mandating the use of unbundled switching solely on a temporary, interim basis to mitigate impairment (*see id*. ¶ 521), again a requirement for which there is no corollary for loops and transport.

Based on these (and several other)[3] basic differences between the requirements for impairment proceedings regarding loops and transport on the one hand, and switching on the other, it makes sense for state Departments to view proceedings concerning the former as subject to a consistent set of procedural rules that are different from those applicable in proceedings concerning the latter. This pleading addresses only loops and dedicated transport. In particular, in the remainder of the pleading, Conversent discusses (1) the substantive impairment standard adopted by the FCC in the *Triennial Review Order*; (2) the manner in which the FCC applied that standard to unbundled loops and dedicated transport (including the responsibilities delegated to the states for determining impairment at particular customer locations for loops and particular central office-to-central office routes for dedicated transport); and (3) the procedures the Department should follow in conducting its fact-finding proceedings regarding loops and dedicated transport. The purpose of the discussion is to propose a coherent substantive and

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[2] Conversent notes that the DTE previously ruled that Verizon must tariff a more efficient, less manually intensive process for individual hot cuts and file a corresponding cost study. Verizon requested and was given permission to base this filing on its WPTS hot cut process. Conversent assumes from the Department's procedural memorandum of September 9, 2003 that hot cut issues, including WPTS issues, will be addressed in this docket.

[3] The description of the differences between loop/transport state proceedings and switching proceedings provided herein is meant to be illustrative rather than exhaustive.

procedural framework for applying the impairment triggers to loops and transport that is consistent with the requirements of the *Triennial Review Order*.

1. Impairment Framework Adopted By The FCC In The *Triennial Review Order*

In the *Triennial Review Order*, the FCC adopted new rules interpreting and applying the standards set forth in Section 251(d)(2) of the Communications Act for establishing incumbent LEC unbundling obligations. Most importantly, the FCC adopted a new interpretation of the "impair" standard contained in Section 251(d)(2). In general, the FCC determined that a requesting carrier is impaired in the absence of unbundling where "all potential revenues from entering a market" using non-ILEC facilities "exceed the costs of entry, taking into consideration any countervailing advantages that a new entrant may have." *Id.* ¶ 84. As the FCC explained,

> this granular analysis is informed by consideration of the relevant barriers to entry, as well as a careful examination of the evidence, especially marketplace evidence showing whether entry has already occurred in particular geographic and customer markets without reliance on the incumbent LECs' networks but instead through self-provisioning or reliance on third-party sources.

Id. Each barrier to entry imposes a cost on prospective new entrants. The greater the entry barriers, the greater the costs and the greater the revenue prospective entrants must earn while relying on non-ILEC facilities to justify entry. Competitors are only deemed to be unimpaired where is it economic for multiple competitors to operate free of reliance on incumbent LEC facilities. *See, e.g., id.* ¶¶ 330, 413, 501.

The entry barriers the FCC deemed relevant to the impairment analysis are (1) scale economies,[4] (2) sunk costs,[5] (3) first mover advantages,[6] (4) absolute cost advantages,[7] and (5) barriers within the control of the incumbent LEC.[8] The FCC found that the most relevant evidence to an inquiry regarding whether these entry barriers result in impairment for a particular network element is "evidence that new entrants are providing retail services in the relevant market using non-incumbent LEC facilities." *Id.* ¶ 93. The FCC's analysis considers both self-deployment by competitors and the availability of wholesale network elements offered by entities that are unaffiliated with the incumbent LEC. *See id.* ¶¶ 95, 101. Both intramodal providers (*i.e.*, those using facilities or technologies found in traditional telephone networks) and intermodal providers (*i.e*., those, such as cable operators, using facilities or technologies not found in traditional telephone networks) are considered. *See id.* ¶ 97.

The FCC was careful to explain that it considered certain kinds of information to be of little relevance to the impairment analysis. For example, the FCC afforded little weight to evidence that a competitor could purchase network elements from the incumbent LEC under

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4 *Id.* ¶ 87. Scale economies are defined as "lower average costs from producing a larger quantity of output." *Id.* n.245. Throughout the FCC's analysis is stressed the importance of high fixed costs (*i.e.*, those that do not change in increases in the number of units produced) because high fixed costs cause scale economies.

5 *Id.* ¶ 88. Sunk costs are defined as "those costs that are unrecoverable upon exit from the market." *Id*. n 244.

6 *Id.* ¶ 89. A first mover advantage is defined as "an advantage in the marketplace as a result of entering the market first." *Id*. n. 249.

7 *Id.* ¶ 90. An incumbent LEC has an absolute cost advantages "if, for any given level of output, its per unit costs are lower than for an entrant." *Id*. n. 247

8 *Id.* ¶ 91.

tariff as an alternative to unbundled network elements. *See id.* ¶ 102. Similarly, evidence that an incumbent LEC may have received pricing flexibility or faces competition in a particular retail market it serves using a particular part of its network is irrelevant to the impairment inquiry. *Id.* ¶¶ 103-104. In neither case does such information pertain to whether non-incumbent LECs can efficiently replicate a particular part of the incumbent's network. Moreover, even though intermodal competitors' ability to replicate network facilities can be relevant to the impairment analysis, the relevance of this ability is substantially diminished where such competitors receive the benefit of advantages in the market not available to others. *See id.* ¶ 98. As the FCC explained, this is particularly true for cable operators:

> Cable telephony and cable modem service, for example, have developed because cable operators have been able to overlay additional capabilities onto networks that they built for other purposes, often under government franchise, and therefore have first-mover advantages and scope economies not available to other new entrants, which lower their incremental costs of providing additional services.

Id. In fact, the FCC concluded that cable companies benefit from "unique" economic circumstances. *Id.* ¶ 310.

Furthermore, the *Triennial Review Order* requires that the inquiry into whether multiple non-incumbent LECs can deploy their own network elements recognize important "market-specific variations." *Id.* ¶ 118. For example, the analysis must take into account differences that exist among different services (*e.g.*, differences in the revenue and cost associated with

deploying circuits at different capacity levels) and indifferent geographic areas. *See id.* ¶¶ 123-130.[9]

Finally, the FCC decided to delegate to the states the responsibility of applying its impairment standard to network elements for which competition varies substantially among different markets, for which the FCC lacked an adequate record to reach impairment decisions, and for which the FCC deemed the states better placed to make specific factual findings. The FCC established specific tests to be implemented by the states to determine whether requesting carriers can economically self-deploy these network facilities in a particular market. The FCC emphasized that "market-by-market fact-finding determinations made by the states" when applying these tests must be made "in conformance with the Act and the regulations set forth herein." *Id.* ¶ 186.

2. Application Of The Triennial Review Order Framework To Loops

In its assessment of whether it is "economic" for multiple competitors to build their own loops,[10] the FCC found that the costs of deploying loops are essentially the same regardless of

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9 In addition to adopting a new interpretation of the impairment standard, the FCC reaffirmed a prior determination that the Section 251(d)(2) directive that it consider impairment "at a minimum" grants it the discretion to consider whether unbundling a particular element promotes other goals of the Communications Act as part of its analysis. *Id.* at ¶ 173. The FCC relied on this authority to eliminate on a national basis incumbent LEC unbundling obligations for certain of the functionalities of fiber-to-the-home and hybrid fiber-copper loops, even where requesting carriers would be deemed impaired in the absence of unbundled access to those functionalities.

10 The FCC defines a loop as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises" as well as "all features, functions and capabilities of such transmission facility, including the [network interface device] NID." *Id.* n. 620. Unbundled loops also include "all electronics, optronics, and intermediate devises (including repeaters and load coils) used to establish the transmission path to the end-user customer

capacity, but that the "ability to recover these construction costs for different loop capacities does . . . vary based on the relevant capacity level of the loop to be provided." *Id.* ¶ 206. As the FCC pointed out, "unlike transport facilities, loops generally do not aggregate multiple customers' traffic." *Id.* ¶ 207. Thus, the ability of a competitor to deploy its own loops is "more closely related to the demands of the individual customer served" by a loop than any other factor. *Id.* Accordingly, the FCC conducted a separate impairment analysis for each category of loop capacity.

In the case of dark fiber, DS3, and DS1 loops, the FCC concluded that the extent to which competitors have deployed their own facilities can "vary tremendously" from one point-to-point route to another (*id.* ¶ 307), and it lacked adequate information to determine on which routes such deployment has occurred or would be efficient. It therefore established specific impairment triggers to be administered by the states.

In describing these triggers the FCC reached several important factual conclusions regarding the viability of competitor deployment of the kinds of loops at issue. As to dark fiber loops, the FCC concluded that the "substantial fixed and sunk costs" of laying fiber as well as entry barriers associated with building access and convincing customers to tolerate the delay associated with construction (*id.* ¶ 312) mean that "it is generally not economically feasible to deploy duplicate fiber loop facilities" (*id.* ¶ 313). The FCC found however that competitors have been able to deploy fiber loops to "some customer locations." *Id.* ¶ 314.

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premises as well as any inside wire owned or controlled by the incumbent LEC that is part of that transmission path." *Id.*

The FCC reached similar conclusions regarding DS3 loops. It made a "national finding that requesting carriers are impaired on a customer-location-specific basis without access to unbundled DS3 loops." *Id*. ¶ 320. According to the FCC, construction of the fiber generally used to provide this level of end user capacity requires competitors to overcome the same entry barriers as with dark fiber. *See id.* Moreover, "unlike deployment at even the lowest OCn level, the record indicates that a single DS3 loop, generally, can not provide a sufficient revenue opportunity to overcome these barriers." *Id.* The FCC did find, however, that "some carriers have been able to overcome these barriers when providing multiple DS3s to a specific customer location." *Id.* ¶ 321. In light of its conclusion that a requesting carrier can overcome the relevant entry barriers at a location where the customer demands three or more DS3 circuits, the FCC established a limit of two DS3s per customer location. *Id.* ¶ 324. The FCC also observed that "the record reflects a small but potentially growing wholesale alternative DS3 loop market." *Id.* ¶ 321.

Finally, the FCC found that "requesting carriers generally are impaired without access to unbundled DS1 loops." *See id.* ¶ 325. The FCC stated that competitors face "extremely high economic and operational barriers in deploying DS1 loops." *Id*. Furthermore, the "small and medium enterprise customers served by DS1 loops provide much lower revenue opportunities than large enterprise market customers" served by higher-capacity loops. *Id.* As a result, revenues generated from customers subscribing to these facilities "are not sufficient to make self-deploying DS1 loops economically feasible." *Id.* ¶ 326. Not surprisingly, the FCC also

found that "the record indicates little evidence of wholesale alternative DS1 loop capacity." *Id.* ¶ 327.

Based on these findings, and based on its recognition that "evidence of self-deployment demonstrates better than any other kind of evidence what business decisions competition carriers have *actually* made regarding the feasibility to deploy facilities," (*id.* ¶ 308 (emphasis in original)) the FCC devised location-specific triggers for determining whether it is feasible for competitors to deploy dark fiber, DS3 or DS1 loops to a particular customer. Where the triggers are not met, the incumbent LEC must continue to unbundle the loop facilities at issue. See *id.* ¶ 328. It is only at the specific customer locations for which the trigger is met for a particular kind of loop that the incumbent LEC is relieved of the obligation to unbundle the type of loop at issue. *See id.* ¶ 328.

The FCC established two triggers, one that tracks the viability of loop self-provisioning and one that tracks the viability of wholesale loop offerings. The self-provisioning trigger for loops requires that competitors be deemed not impaired at a particular customer location that is "currently served" by two or more carriers using their "own" loops at the relevant capacity level. *See id.* ¶ 329. To qualify as one of the two competitors, a carrier must "have existing facilities in place serving customers at that location over the relevant loop capacity level." *See id*. ¶ 332. Also, a carrier must be "unaffiliated" with the incumbent LEC and with the other self-deploying competitive carrier. That is, a competitor must not directly or indirectly own or control or be owned or controlled by or be under common ownership or control with the incumbent LEC or the other competitor. *See id.* n. 980. For the purposes of affiliation, "own" means an equity

interest or equivalent thereof of more than 10 percent. *See id.* Furthermore, "the facilities these competitors use must be their *own facilities* and not facilities owned or controlled by one of the other two providers to the premises, *i.e.*, the incumbent LEC and the other competitive provider." *See id.* ¶ 333 (emphasis in original). For example, neither a competitor that has purchased dark fiber loops from the incumbent as an unbundled network element and attached its own optronics (¶ 329) nor a competitor that has purchased loop facilities from the incumbent under a special access tariff nor a competitor that is using the loops of another carrier serving the building (¶ 333) may qualify as a competitor under the self-provisioning trigger. However, a competitor that purchases dark fiber on a long-term indefeasible-right-of-use (IRU) basis from the incumbent LEC or a competitor and attached its own electronics will be deemed to have self-provisioned the end user connection. *See id.* ¶ 333, n. 981.

In addition to requiring states to apply the quantitative self-provisioning trigger, the FCC ruled that the states must also *consider* whether multiple competitors "could" economically self-provision a loop of the relevant capacity at a particular customer location, even if two carriers have not yet done so and the quantitative self-provisioning trigger has not therefore been met. *See id.* ¶ 335. It is important to clarify, however, that the states are only required (or indeed given the discretion) to consider overriding the results yielded by applying the *self-provisioning* quantitative trigger. The states do not have the discretion to override the results yielded by the *wholesale* quantitative trigger, discussed below.

In addressing the question of when a state should override the results yielded by application of the self-provisioning quantitative trigger, the FCC emphasized that the quantitative

trigger (the trigger based on two self-provisioners) is the "best indicator" of whether competitors are impaired and is therefore the "primary vehicle" for state application of the impairment standard to self-provisioning. *See id.* Nevertheless, if the state determines that "no material economic or operational barriers at a customer location preclude competitive LECs from economically deploying loop transmission facilities to that particular customer location at the relevant loop capacity level," then it must eliminate incumbent LEC unbundling obligations. *Id.* ¶ 335. The FCC stated that the states "must consider" "factors affecting the ability to economically deploy at that particular customer location." *See id.* Those factors include the following:

> evidence of alternative loop deployment at that location; local engineering costs of building and utilizing transmission facilities; the cost of underground or aerial laying of fiber or copper; the cost of equipment needed for transmission; installation and other necessary costs involved in setting up service; local topography such as hills and rivers; availability of reasonable access to rights-of-way; building access restrictions/costs; availability/feasibility of similar quality/reliability alternative transmission technologies at that particular location.

See id.

Alternatively, the FCC stated that a state may determine that competitors are impaired without access to loops of a certain type even though the quantitative trigger has been met for a particular customer location. This would be the case, for example, where there are "barrier[s] to further competitive facilities deployment" such as a long-term moratorium on granting permits to access rights-of-way. *See id.* ¶ 336. In such cases, a state may petition the FCC to waive the application of the self-provisioning trigger. *See id.*

The wholesale trigger for loops requires that competitors be deemed not impaired at a particular customer location where two or more competitive providers have deployed the

relevant type of transmission facilities *and* where the competitors "are offering alternative loop facilities to competitive LECs on a wholesale basis." *See* ¶ 329.[11] As with the self-provisioning trigger, the competitors must be unaffiliated with the incumbent LEC and each other based on the affiliation standard discussed above. The wholesaler also must "offer an equivalent wholesale loop product at a comparable level of capacity, quality, and reliability," and "have access to the entire multiunit customers premises" where the customer is located in such a building. *See id.* ¶ 337. In addition, the wholesaler must "offer the specific type of high-capacity loop over [its] own facilities on a widely available wholesale basis to other carriers desiring to serve customers at that location." *Id.* As again with the self-provisioning trigger, a competitor is deemed to be using its own facilities under the wholesale trigger where it has obtained dark fiber from another entity (including the incumbent LEC) under an IRU and attached its own optronics. *See id.* But unlike the self-provisioning trigger, a wholesaler will also be deemed to be using its own facilities if it has acquired dark fiber under any other legal "lease/purchase basis," including as an unbundled network element, and attached its own optronics. *See id.* Moreover, while a state should not undertake a financial viability test, "there should be some reasonable expectation" that the wholesaler is "operationally capable of continuing to provide wholesale loop capacity" to the customer location in question. *Id.* ¶ 338.

Lastly, it is important to highlight that these two triggers apply somewhat differently to the three loop categories at issue here. The self-provisioning trigger is the only trigger applicable

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[11] As mentioned, unlike the self-provisioning quantitative trigger, the states do not have the authority to override the results yielded by applying the quantitative wholesale trigger based on the conclusion that carriers "could" provision loop facilities.

to dark fiber loops (the wholesale trigger does not apply to dark fiber loops). *See id.* ¶ 334. An unaffiliated competitor that has deployed its own fiber facilities to a particular customer location counts as one of the two competitors for purposes of this trigger regardless of whether it offers dark fiber to other carriers. *See id.* In contrast, both the self-provisioning trigger and the wholesale trigger apply to DS3 loops. If either trigger is met for DS3 loops at a particular customer location, the incumbent LEC is no longer required to unbundle DS3 loops at that location. Moreover, the self-provisioning trigger does not apply to DS1 loops, since the FCC found that "there is little record evidence demonstrating that carriers construct facilities to serve customers exclusively as the DS1 level." *Id.* Only the wholesale trigger applies to DS1 loops.

3. Application Of The Triennial Review Order Framework To Dedicated Transport

In applying its impairment standard to dedicated transport,[12] the FCC found, as a general matter, that "[d]eploying transport facilities is an expensive and time-consuming process for competitors, requiring substantial fixed and sunk costs." *Id.* ¶ 371. As with loops, the FCC recognized that the ability of competitors to deploy transport can "vary tremendously" by geographic area. *Id.* ¶ 376. The FCC also found that most transport has been deployed by competitors in the "most densely populated areas" and that a disproportionate amount of transport has been deployed in the 25 largest metropolitan statistical areas or "MSAs." *Id.* ¶ 378. Broad patterns like this, however, can obscure critically important differences in impairment from one point-to-point route to another within the same geographic area. Accordingly, again as

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[12] In the *Triennial Review Order*, the FCC modified the definition of dedicated transport. The definition adopted in the order and applicable now is "transmission facilities connecting incumbent LEC switches or wire centers within a LATA" and dedicated to a particular competitive carrier. *Id.* ¶ 365.

with loops, the FCC concluded that "the barriers to entry that requesting carriers face are most precisely identified on each geographic route connecting two points," although in some cases nationwide determinations of impairment or non-impairment are possible. *Id.* ¶ 376.

The FCC reached the following conclusions with regard to dedicated transport. *First*, it found that, on a national basis, competing carriers are impaired without access to unbundled dark fiber transport. *Id.* ¶ 381. It reached this conclusion based on the "large fixed and sunk costs" that must be incurred to "self-provision fiber transport facilities." *Id.* ¶ 382. These costs "include obtaining rights-of-way, the costs of fiber, the cost of deploying the fiber, and the optronic equipment necessary to activate the fiber." *Id.* The FCC also noted that retaining unbundled dark fiber "avoids unnecessary digging of streets" that can cause significant disruption traffic and commerce. *Id.* ¶ 383. While it found that "dark fiber transport is generally not available in most areas of the country," the FCC still concluded that it lacked sufficient evidence to identify the specific point-to-point routes on which competitors are not impaired. *Id.* ¶ 384. It therefore delegated to the states the responsibility of applying competitive triggers on a point-to-point basis as explained below. *Id.*

Second, the FCC determined on a nationwide basis that requesting carriers are impaired without access to unbundled DS3 transport. *See id.* ¶ 386. In the "majority of areas" (*id.* ¶ 387), the FCC found that the revenue opportunities associated with a DS3 transport link are not adequate to offer a competitor a "reasonable expectation of recovering the costs of deployment over time" (*id.* ¶ 386). The FCC did observe the presence of some competitor deployment of DS3 transport, mostly in "dense urban areas." *Id.* ¶ 387. The FCC found that it lacked sufficient

evidence to identify the specific point-to-point routes on which competitors are not impaired and therefore delegated this responsibility to the states as explained below. *Id.* The FCC did determine, however, that competitors can generally deploy their own dedicated transport on routes that generate more than 12 DS3s worth of traffic, and it therefore established a limit of 12 DS3s for any competitor on any single point-to-point route. *See* i*d*. ¶ 388.

Third, the FCC concluded that competitors are not impaired on a national basis without access to OCn dedicated transport. *Id.* ¶ 389. Instead, it found that "dark fiber and multiple DS3 circuits provide reasonable substitutes for OCn interoffice circuits." *Id.*

Fourth, the FCC concluded that competitors are impaired on a national basis without access to DS1 transport. *Id.* ¶ 390. The FCC found that competitors generally cannot self-deploy DS1 transport because they lack a reasonable expectation of recovering the fixed and sunk costs of deploying transport. *See id.* ¶ 391. Although the FCC found "very limited evidence" of competitors obtaining DS1 transport from non-incumbent LEC wholesalers (*see id.* n. 1216), it nevertheless found that (as described below) applying a wholesale availability trigger to DS1 transport was appropriate based on the FCC's "predictive judgment" that technological advances may make such a wholesale market practical. *Id.* ¶ 392.

As with loops, the FCC established both self-provisioning and wholesale triggers for dedicated transport. Under the self-provisioning trigger, competitors are deemed unimpaired on a particular point-to-point route "where *three* or more competing carriers, not affiliated with each other or the incumbent LEC, each have deployed non-incumbent LEC transport facilities along [the] specific route, regardless of whether these carriers make transport available to other

carriers." *Id.* ¶ 400 (emphasis added). Under the wholesale trigger, competitors are deemed unimpaired on a particular point-to-point route "where competing carriers have available *two* or more alternative transport providers, not affiliated with each other or the incumbent LEC, immediately capable and willing to provide transport at a specific capacity along a given route between incumbent LEC switches or wire centers." *Id.*

The FCC explained that, for purposes of both triggers, a point-to-point route to which the triggers apply consists of the two ends of the circuit on which non-incumbent LECs have actually deployed transport. *See id.* ¶ 401. Thus, if enough non-incumbent transport exists between central offices/wire centers A and Z, that route is not subject to unbundling, even though the non-incumbents may not pass through intermediate central office/wire center X. *See id.* However, to qualify as one of the non-incumbent transport circuits on a particular route under the triggers, the circuit must be self-deployed or made available at wholesale by a single entity (eliminating the need to cobble together circuits from multiple sources on a particular route). *See id.* ¶ 402. Furthermore, the transport providers must (under both triggers) be unaffiliated with each other and with the incumbent, applying the affiliation standard described above. *See id.* ¶¶ 408, 414.

As with loops, the FCC established specific requirements that a carrier must meet to count toward the three self-provisioning test. Thus, "[e]ach counted self-provisioned facility along a route must be operationally ready to provide transport into or out of an incumbent LEC

central office"[13] and "must terminate in a collocation arrangement which may be arranged either pursuant to contract, tariff or, where appropriate, Section 251(c)(6) of the Act." *Id*. ¶ 406. As also with loops, a self-provisioner will be deemed to have its "own" transport facilities where it relies on dark fiber obtained from another carrier, including the incumbent LEC (*see id.* n. 1265) on a long-term IRU basis and has activated that fiber using its own optronics. *Id.* 408. However, carriers operating pursuant to IRUs for lit fiber do not qualify as using their "own" facilities. *Id.*

As with loops, the FCC "emphasize[d] that [the] quantitative trigger is the primary vehicle through which non-impairment findings will be made." *Id.* ¶ 410 Nevertheless, the FCC, as with loops, stated that the state "must consider and may also find no impairment on a particular route that it finds is suitable for 'multiple, competitive supply,' but along which this trigger is not facially satisfied." *Id.* It should be clarified that, again as with loops, the FCC only granted the states the obligation (or indeed the discretion) to override the results yielded by applying the *self-provisioning* quantitative trigger. The states do not have the discretion to override the results yielded by applying the *wholesale* quantitative trigger.

The FCC provided that the states "must" base any decision to override the results yielded by the self-provisioning quantitative trigger for dedicated transport on the following economic characteristics:

> local engineering costs of building and utilizing transmission facilities; the cost of underground or aerial laying of fiber; the cost of equipment needed for

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[13] As the FCC explained, this requirement "is intended to preclude counting competitive facilities before the facility is capable of operation on that route." *See id.* n. 1256. For example, "the incumbent LEC must have fully provisioned the collocation arrangement (e.g., provided space and power) before the route could be considered complete." *Id.*

> transmission; installation and other necessary costs involved in setting up service; local topography such as hills and rivers; availability of reasonable access to rights-of-way; the availability or feasibility of alternative transmission technologies with similar quality and reliability; customer density or addressable market; and existing facilities-based competition.

Id. The FCC stated that it is important for the federal agency to "delegate this limited additional analysis" to states that are better placed to assess these factors. *Id* Finally, the FCC also stated that the state may conclude that carriers are impaired in the absence of unbundled dedicated transport on which the quantitative trigger is met because of special circumstances (such as a moratorium on access to public rights-of-way as mentioned above), in which case the state can petition the FCC for waiver of the self-provisioning trigger for dedicated transport. *See id*. ¶ 411.

As to the wholesale trigger for dedicated transport, the FCC ruled that carriers that acquire dark fiber, either under an IRU or as an unbundled network element, and light the fiber with their own optronics can count as wholesalers for purposes of DS1 and DS3 transport so long as they meet the other requirements of the trigger. *See id.* ¶ 414. Those requirements include the need for a wholesaler to "be operationally ready and willing to provide the particular capacity transport on a wholesale basis along the specific route." *See id.* If a wholesaler does not, for example, have its facilities terminated or collocated in the relevant central office or is not for some other reason ready to provide transport "immediately" (due, for example, to the incumbent's failure to offer cross-connects between competitors' collocated equipment or to connect to a competitive fiber termination panel), it cannot count for purposes of the wholesale transport trigger. *See id.* The FCC also emphasized that the wholesaler must make the transport capacity at issue "widely available." Furthermore, the FCC specifically stated that, with regard

to wholesale dark fiber, a state "may ensure that wholesalers of dark fiber have sufficient quantities of dark fiber available to satisfy current demand." *See id*. ¶ 416.

As with loops, the FCC decided to apply the triggers differently to different kinds of transport circuits. Thus, the self-provisioning trigger applies to dark fiber and DS3 transport, but not to DS1 transport. *See id*. ¶ 409. In contrast, the wholesale trigger applies to dark fiber, DS3 as well as DS1 transport.

4. Proposed Rules For State Proceedings Applying FCC Impairment Triggers For Loops And Transport

The FCC determined that states must complete their initial application of both the loop and transport triggers within nine months of the effective date of the *Triennial Review Order*. *See id.* ¶¶ 339, 417. The loop and transport facilities that are subject to the triggers are to remain available on an unbundled basis pending completion of the application of the triggers. *See id.* ¶ ¶ 328, 417. Moreover, the FCC stated that states need only conduct the review required by the triggers for loop and transport routes for which there is "relevant evidence in the proceeding" that the loop or transport route satisfies the trigger. *See id*. If a state fails to act within the required nine month period, aggrieved parties may petition the FCC to perform the role delegated to the states. *See id*. For those loops and transport circuits that meet the relevant triggers and for which unbundling is no longer required, the FCC directed the states to grant competitive LECs an "appropriate period" to transition to other arrangements. *See id.* Finally, the FCC directed the states to conduct subsequent proceedings to apply the triggers "pursuant to procedures the state Departments adopt." *See id*. ¶¶ 340, 418.

The FCC left it to the states to determine exactly how to collect information needed to apply the triggers as well as how to proceed with other aspects of the impairment "fact-finding" that it delegated to the states. There are four general challenges relevant to this inquiry. *First*, it is important for the Department to determine how it will go about collecting and reviewing the information needed to apply the self-provisioning and wholesale quantitative triggers for loops and transport during the nine months allotted by the FCC while still allowing parties to try to meet the heavy burden of demonstrating that the results yielded by the quantitative triggers should be overridden. In considering this question, the Department should be guided by the principle that it should seek information from the sources that can provide it most efficiently while imposing as few burdens as possible on those without access to relevant information.

To collect the information needed for the loop quantitative triggers, the Department should require all carriers certified to provide telecommunications service in the state to inform the Department as to whether they have self-provisioned any dark fiber, DS3 or DS1 loops, as that term is defined under the self-provisioning quantitative trigger (e.g., including situations in which dark fiber has been obtained pursuant to a long-term IRU and lit by the competitor's optronics but excluding those where dark fiber is purchased as an unbundled network element).[14]

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[14] The *Triennial Review Order* becomes effective 30 days after publication in the Federal Register (which occurred on September 2, 2003), pending Office of Management and Budget approval. *Id.* ¶ 830. The states are required to complete their loop and transport impairment proceedings nine months after the *Triennial Review Order* becomes effective (which is October 2, 2003). *See id.* ¶¶ 339, 417. The time frames suggested by Conversent in this pleading assume that the Department will spend the time prior to October 2nd considering procedural issues and developing standard forms for soliciting information needed to apply the quantitative triggers. The time frames suggested also assume that the Department will begin

Entities that inform the Department that they have self-provisioned loop facilities should be required to identify the type of service and customer locations served. All responses regarding self-deployment must remain proprietary when such treatment is requested and appropriate. Proprietary treatment of customer information is especially important because revealing information regarding customer location and services provided to a carrier's competitors would result in the disclosure of important information regarding a carrier's business plans and strategies and could also lead to unfairly targeted win-back campaigns by the incumbent and other competitors.

The Department should also require all entities certified to provide service in the state to inform the Department as to whether they provide DS1, DS3 or dark fiber loops at wholesale over their own facilities (again, using the applicable definition of own facilities for these purposes, including those that obtain dark fiber as a UNE and light it with their own electronics). Respondents should be required to identify the type of loops provided and the customer locations at which they meet the relevant requirements described above for wholesalers to count under the quantitative trigger (*e.g.*, that it can provide the loop at wholesale promptly to a requesting carrier, that it makes the loops widely available, etc.).

It is important to emphasize that the Department's information request should be as simple to meet as possible. Furthermore, while it would be appropriate to impose penalties on those entities within the Department's jurisdiction that fail to provide pertinent information, it

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fact solicitations on October 2nd. If, however, that process begins earlier, the time frames suggested herein could be lengthened, if appropriate.

would also be appropriate to allow those entities that do not qualify as a self-provisioner or wholesaler under the quantitative triggers to *not respond* to the Department's information request. All states are going to engage in the information gathering process needed to apply the quantitative triggers and even responding to solicitations in the negative in all of the states in which a competitor operates will become unnecessarily burdensome. Eliminating the requirement to submit negative responses will also save the Department the time and resources needed to sort through responses that are irrelevant to the application of the quantitative triggers. Thus, the Department should establish a rule that those entities that fail to respond can be assumed not to have deployed facilities that count under the quantitative triggers, again subject to penalty if this is in fact untrue.

Given that some of the information sought in these inquiries may not be easily provided by potential respondents and given that they will be responding to similar inquiries in all of the states in which they operate, the Department should provide at least 60 days for entities to respond (with extensions where appropriate). The Department should then determine whether the quantitative triggers have been met for any of the customer locations in the state. This process should be completed within 60 days (less of course if the Department considers it feasible). Indeed, if the Department is able to devise and distribute along with its requests for information a simple, standard form (which should not exceed one or two pages) for respondents to provide information regarding facilities deployment, determining whether quantitative triggers have been met should be fairly quick. In this regard, Conversent has prepared information requests pertaining to loops and transport that the Department could issue to certified providers

to determine the extent to which the triggers have been met. These information requests are contained in Exhibit A, attached to these Comments.

Once the Department has made its determinations as to those customer locations for which the self-provisioning and/or wholesale triggers have been met, it should then make that information public (again, subject to protections for proprietary information where appropriate). Interested parties should then be given 60 days to file objections that any of the information in the disclosure is inaccurate. Where appropriate, the Department would then have the discretion to revisit its findings and to seek more information from the relevant parties as necessary to determine whether the quantitative trigger is, in fact, met.

The Department should follow the same procedures and timeline for collecting information needed for the dedicated transport quantitative triggers. The only difference of course would be that the information requested would conform to the requirements of the transport quantitative triggers as described above. Requests for information regarding loops and transport should be included on the same information solicitation form.

Second, the Department must determine how it will go about considering whether multiple competitors *could* self-deploy their own loops or transport in cases where the quantitative self-provisioning triggers have not been met. As explained, the self-deployment triggers apply to dark fiber and DS3 loops and to transport. The question of whether the Department should override the results of the quantitative trigger is therefore irrelevant to DS1 loops and transport.

The FCC expressly characterized the quantitative triggers as the "primary vehicle" (*id.* ¶¶ 335, 410) for states to determine impairment on a granular basis, and it described the states' consideration of whether to override the results yielded by the quantitative triggers as a "limited additional analysis" (*id.* ¶ 410). Furthermore, while the FCC stated that states "must consider" evidence that pertains to whether the results of applying the quantitative trigger should be ignored, it did not state that the state must itself gather such evidence. *See id.* ¶¶ 335, 410.

In addition, any such evidence can only justify overriding the results of quantitative triggers where the state concludes that "no material economic or operational barriers" prevent a carrier from self-deploying a facility. *See id.* ¶ 335. The possible "material economic or operational barriers" that could prevent self-deployment of either loops or transport are, as the quoted passages provided above illustrate, numerous and varied. Moreover, the Department "must" base its decision to override the results of a quantitative trigger on all of the factors listed in paragraphs 335 (for loops) and 410 (for transport) of the *Triennial Review Order*, quoted above. This requirement reflects the FCC's understandable concern that any one of the potential entry barriers listed in those paragraphs could constitute a "material economic or operational barrier" that prevents self-deployment from being "economic."

But it is simply not practical for the Department to study the significance of all of the potential entry barriers listed in paragraphs 335 and 410 for every dark fiber and DS3 loop and dedicated transport circuit. Especially in light of the burden associated with applying the quantitative triggers and, more dauntingly, conducting the switching impairment proceeding, the

question of when to override the results of the quantitative trigger must indeed be engaged on a "limited" basis.

There is also a problem with timing any examination of whether multiple competitors *could* deploy their own loop/transport facilities in particular location. Such an examination will take a significant amount of time to prepare, and interested parties must be given adequate time to study and comment on any such analysis. The Department will then need to review the relevant comments and reach a final decision. This process could well take nine months in and of itself. Unfortunately, such a process must therefore take place while the Department is determining where the quantitative triggers have been met.

Based on these considerations, and keeping in mind the "limited" scope of the analysis as intended by the FCC, the Department should approach the question of where the quantitative triggers should be overridden in the following manner. The Department should require that any party seeking to submit a study demonstrating that, regardless of the results yielded by the application of the quantitative triggers, multiple competitors could economically provision their own facilities at a particular customer location or along a particular transport route, to do so within 120 days of the initiation of the proceeding. Interested parties should then be given at least 60 days to comment on the studies submitted. The timing of the comments filed on the studies should coincide with objections to the results of quantitative trigger results. Given the overlap of the information in these two filings, interested parties should be permitted to combine the two discussions in a single pleading. The Department would then consider the record in light of the results yielded by the quantitative triggers.

The Department should clarify that parties should target requests for overriding the quantitative triggers to areas where the FCC's impairment analysis indicates that lack of impairment is more likely. For loops, the FCC indicated that self-provisioning "usually" occurs at a "multiunit premises location" (*id.* ¶ 303) and that competitors generally are unable to economically self-deploy loops where a customer demands only a single DS3 (*id.* ¶ 321). Parties seeking to demonstrate that quantitative triggers should be overridden for loops should therefore be strongly encouraged to focus on customer locations with these characteristics. Indeed, the Department should clarify that the burden of proof is especially high for parties seeking to override the quantitative triggers for customer locations other than multi-unit premises that are served by more than one DS3. Furthermore, the FCC indicated that states should take into account "alternative loop deployment" at the location in question. *See id.* ¶ 335. The absence of a single self-deployed loop by a competitor should be deemed strong evidence that the quantitative triggers should not be overridden. In addition, given the FCC's conclusions that cable operators have benefited from "unique" advantages (*id.* ¶ 310), little weight should be given to the fact that a cable operator has self-deployed loop facilities to a particular customer location (unless a party can demonstrate that the cable operator faces the same entry barriers as other carriers in the market).

Similar time frames and evidentiary burdens should be applied to requests to override the self-provisioning quantitative trigger for dark fiber and DS3 dedicated transport. As to the specific evidentiary burden, the FCC observed that competitors have been able to deploy their own transport "in dense urban areas." Accordingly, the Department should urge parties

submitting studies on transport to focus on Boston where traffic aggregation is significant enough to potentially justify self-deployment. Indeed, it would be appropriate to establish a heightened burden of proof for areas outside downtown Boston. As with loops, the FCC found that "existing facilities-based competition" is relevant to any attempt to demonstrate that multiple (indeed *three or more*) competitors could self-deploy dark fiber or DS3 transport. *See id.* ¶ 410. The absence of a single transport circuit self-deployed by a competitor should be deemed strong evidence that the quantitative triggers should not be overridden on a particular route. In addition, as with loops, the FCC's conclusions that cable operators have benefited from "unique" advantages (*id.* ¶ 310) mean that little weight should be given to the presence of cable transport or indeed transport deployed by other entities, in particular power companies, that have benefited from similar advantages.

Third, the Department must determine what it considers to be an "appropriate period" for competitors to transition to other arrangements for loops and transport for which competitors are deemed not impaired. *See id.* ¶¶ 339, 417. Transitions should "afford sufficient time for carriers to implement any necessary business and operational plans and practices to account for the changed regulatory environment." *Id.* ¶ 529 (discussing transition for switching). As the FCC recognized with regard to switching, these considerations require that an incumbent LEC continue to provide an unbundled network element for a period of time after the state has decided that there is not impairment so that competitors can make needed adjustments. *See id.* The question of how long that obligation should continue, however, raises complex factual issues such as how long it takes to deploy fiber facilities where conduit is available versus where it is

not available, whether the incumbent LEC has established an adequate process for allowing carriers to switch to competitive wholesalers, and, if so, how long the process takes. Given the numerous variables associated with determining the appropriate transition period, Conversent urges the Department not to attempt to reach any conclusions on this issue at the present time and to instead initiate a separate inquiry into the matter to be resolved, based on a complete record, in the future.

Respectfully submitted,

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